

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.768 OF 2006

IN

SECOND APPEAL NO.378 OF 2003

Sakharam Ramchandra Chougule

...Applicant

Vs.

Madhavrao Vithaji Patil

(since deceased through L.Rs.) and Ors. ...Respondents

Shri A.A.Kumbhakoni, Associate Advocate General with
Shri T.D.Deshmukh for the Appellant

Ms S.A.Mudbidri for the Respondent Nos.1-a to 1-d.

CORAM: A.S.OKA, J.

DATED: MAY 5, 2006.

P.C.:

1. This application is made by the Appellant in the Second Appeal seeking permission to withdraw the original suit with liberty to prosecute a subsequently filed suit being R.C.S.No.51 of 2006.

2. The Appellant is the unsuccessful Plaintiff. The Appellant had filed a suit simplicitor for injunction on the footing that he was in possession of the suit property. The suit was decreed by the trial court. The Appellate Court has reversed the decree and has dismissed the suit.

3. The Appellate Court while reversing the decree passed by the Trial Court has held that there was no partition between the two branches of the family and therefore the Appellant cannot claim to be in exclusive possession of the suit property.

4. This Application is filed by the Applicant/Appellant for pointing out that subsequently a substantive suit being R.C.S.No.51 of 2006 for partition and separate possession has been filed by him. He has prayed that in view of filing of the said suit the Appellant desires to withdraw the suit which is subject matter of the Second Appeal with liberty to prosecute the R.C.S.No.51 of 2006. The learned Advocate for the Respondent has opposed this prayer. She submitted that at the stage of Second Appeal, it is not permissible to allow the Appellant to withdraw the suit as the stage at which the suit could have been withdrawn is already over. She submitted that as a result of withdrawal of the suit, the findings which are recorded in favour of the Respondent will go and thus undue advantage will be obtained by the Appellant. In response to the said submission, the learned Counsel for the Appellant submitted that the Appellant has accepted the findings of the Appellate Court to be true and correct that there was no partition and that the Appellant cannot be said to be in exclusive possession of the suit

property.

5. I have considered the submissions. So far as power of the court of allowing the withdrawal of the suit at the stage of Second Appeal is concerned, the question is no longer res integra. The Apex Court in paragraph No.12 its decision reported in (2000) 5 S.C.C. 458 (K.S.Bhoopathy and others vs. Kolila and others) held thus :

"12. The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts :

- (a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the court; in that case he will be precluded from suing again on the same cause of action. Neither can the plaintiff abandon a suit or part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and
- (b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted by the court enables the plaintiff to avoid the bar in

Order II Rule 2 and Section 11 CPC."

In paragraph 13 the Apex Court has observed thus :

"13...No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more

important in a case where the application under Order XXIII Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. **The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file a fresh suit on the same cause of action...."**

6. What has been held by the Apex Court is that the Plaintiff may be permitted to withdraw the suit with liberty to file a fresh suit on the same cause of action. It is also held that the said opportunity can be granted to avoid bar under Order II Rule 2 or under section 11 of the Code of Civil Procedure, 1908. The Apex Court held that a Plaintiff

can be permitted to withdraw the suit with liberty as aforesaid at the stage of Second Appeal provided strict compliance with law is ensured. In the present case, in the original suit filed by the Appellant which is the subject matter of the Second Appeal, a prayer was not made for partition and the suit was simplicitor for injunction. Therefore, bar as mentioned in clause (b) of paragraph 12 of the Judgment of the Apex Court will be attracted. In this view of the matter and in view of what is held in clause (b) of paragraph 12 of the Judgment of the Apex Court, permission can be granted to withdraw the suit. In the present case the learned Counsel for the Appellant on instruction of the Appellant categorically stated that the Appellant has accepted the finding of the Appellate Court that there was no partition of the suit property and that the Appellant was not in exclusive possession of the suit property. The said statements are accepted. In view of the said statements, discretionary power deserves to be exercised in favour of the Appellant. A substantive suit for partition is already filed.

7. Hence, Appellant is permitted to withdraw the R.C.S.No.72 of 1990 with liberty to prosecute R.C.S.No.51 of 2006. Civil Application is accordingly allowed.

8. All questions on the merits of the R.C.S.NO.51 of 2006

are expressly kept open.

Judge .